DEWARAMAH ELLAPIN

v.

IBRAHIM ABDUL HAMID & ANOR.

HIGH COURT MALAYA, ALOR SETAR
LIM BENG CHOON J
[CIVIL SUIT NO. 197 OF 1979]
29 NOVEMBER 1987

TORT: *Road Accident - Dependency claim - Negligence - Deceased riding motor cycle behind defendant's motor lorry - Defendant gave signal indicating intention to turn right - Police report of defendant made within short interval after accident - Whether probable that report was made as an after-thought - Deceased rider overtook defendant's motor lorry - Sketch plan - Inference to be drawn - Ample room to overtake on left side of motor lorry.*

The plaintiff's claim is for general and special damages for the benefit of the estate of the deceased/rider and also for loss of support of the dependants of the said deceased arising out of an accident on 5 October 1976 at about 7.25 a.m. along the Alor Setar/Sg. Patani highway involving a motor cycle ridden by the deceased and a motor lorry driven by the first defendant, consequent to which the deceased/rider of the said motor cycle was killed.

The plaintiff alleged that the accident was caused solely by the negligence of the first defendant, particulars of negligence *inter alia* paraphrased as follows: The first defendant had failed to look to his rear to ascertain whether any vehicle was in the process of overtaking him, and also that he had failed to keep any or any proper lookout for the approach of the deceased from the rear. The more serious allegation was that the first defendant made a sudden turn to his right without giving any warning despite the fact that the deceased had given warning of his intention to overtake the lorry.

The defendants denied negligence and averred *inter alia* that the accident was caused wholly by the negligence of the deceased himself. The crux of the defence was that the deceased was riding his motorcycle too close to the said lorry, and that he had failed to take heed of the signal given by the first defendant which was indicative of his intention to turn to the right. The defendants further averred that the deceased rode his motor cycle in a careless and negligent manner, and, that the deceased had failed to keep any or any proper lookout for other road users, particularly the lorry driven by the first defendant.

Held:

[1] The deceased-rider was totally at fault as it was due to his negligence that the accident occurred.

[2] The Court cannot find anything to default the first defendant as he had done all he could and had observed the essential rules of the road.

[3] In the circumstances, the plaintiff's claim was dismissed with costs.

[Plaintiff's claim dismissed with costs.]

Case referred to:
Lim Hong Yap v. PP [1978] MLJ 154

Legislation referred to:
Civil Law Act 1956, s. 7

For the plaintiff - Brijnandan Singh Bhar; Syarikat Brijnandan Singh Bhar
For the defendants - Abdul Malik bin Haji Ishak; Kedah State Legal Adviser

JUDGMENT

Lim Beng Choon J:

On 5 October 1976 at about 7.25 a.m. an accident occurred along the Alor Setar/Sg. Patani highway involving a motorcycle and a lorry driven by the first defendant, Ibrahim bin Abdul Hamid. As a result of the accident, the rider of the motorcycle, Subramaniam a/l Kaliappan was killed. Hence, the widow of the deceased brought this action to claim damages for the benefits of the estate of the deceased, and also for loss of support of the dependants of the deceased comprising of the plaintiff herself, the widow, and 3 children whose ages ranged from 7 years to 3 years at the time of the accident.

The plaintiff alleged that the accident was caused solely by the negligence of the first defendant, and she gave particulars of the negligence at p. 2 of the statement of claim (see p. 5 of the bundle of pleadings). Although there are nine items given in the particulars of negligence, they can briefly be paraphrased as follows. It was said that the first defendant had failed to look to his rear to ascertain whether any vehicle was in the process of overtaking him, and also that he had failed to keep any or any proper lookout for the approach of the deceased from the rear. The more serious allegation was that the first defendant made a sudden turn to his right without giving any warning of his intention to overtake the lorry. Turning to the statement of defence, the defendants denied negligence, and averred that the accident was caused wholly by the negligence of the deceased himself. They had also particularised the negligence committed by the deceased (see p. 7 of the bundle of pleadings). However that may be, the crux of their defence was that the deceased was riding his motorcycle too close to the said lorry, and he had failed to take heed of the signal given by the first defendant which was indicative of his intention to turn to the right. They further averred that the deceased rode his motorcycle in a careless and negligent manner, and, that the deceased had failed to keep any or any proper lookout for other road users, particularly the lorry driven by the first defendant.

It is most unfortunate that the plaintiff was not able to locate any person who happened to witness the accident. Hence, she was not able to call any witness to testify on behalf of the case for the plaintiff. As she herself did not witness the accident, naturally her evidence was entirely confined to the losses suffered by her in terms of loss of support and loss of future earnings for the benefit of the estate to which she is a beneficiary. However, she did say in her evidence that the deceased used to travel to Alor Setar every morning at 7 a.m. to teach in a school in the Alor Setar town, and that the deceased was a careful person and was quite used to the road. The second witness called by the plaintiff, was one P. Pushpanathan who was and still is attached to the State Education Officer as a State Supervisor of Schools. This witness also merely testified about the earnings which the deceased would have received in the future but for his premature death. It is obvious that as the evidence of the 2 witnesses was aimed at proving the damages suffered by the plaintiff and the other dependants of the deceased. I cannot proceed to assess the same considering whether or not it was due to the first defendant that led to the accident culminating in the death of the deceased.

At the close of the case for the plaintiff, the defendants first of all called the driver of the lorry, the first defendant to testify. This witness said that he had been driving JKR Lorry since 1952, and on that day in question at about 7 a.m. he left the JKR Barracks I to proceed

to JKR Barracks II to collect a chain saw machine. Although the day was somewhat foggy, nevertheless the visibility was good. However, he took the precaution of switching on his small tail light while he was driving along the Alor Setar/Sungei Patani highway ("the highway") at the speed of 25 m.p.h. towards the direction of Alor Setar Town. When he was approaching the junction which led to JKR Barracks II ("the junction"), and, which was on the right hand side of the road as one faces Alor Setar Town, he switched on his light signal, and, at the same time he also put out his right hand to indicate his intention of turning right. His lorry was about three telephone posts (which is about 100 to 120 feet) from the junction at that time and it was travelling on the crown of the road. At the same time the first defendant also looked at his rear view mirror and he saw no vehicle following him from the rear. When his lorry was about 60-70 feet from the junction he applied his brakes and started to make a gradual turn to his right. He did not hear any hooting sound from any vehicle. The first time he became aware of the deceased's motorcycle was when it collided on to the off-side front mudguard of his lorry. At the time of collision, the front part his lorry had already gone over to the right half of the road. The first defendant also said that when he was about 60-70 feet from the junction he looked at the rear view mirror one more time and he saw "there was nothing." Under cross-examination, the first defendant reiterated that he did give the light signal when he was "three telephone posts" away from the junction and at the same time he looked at his rear view mirror but he did not see any vehicle following him from the rear. At that time his lorry was about 10 feet away from the edge of the left half of the road measured from the driving seat. He also affirmed that when his lorry was about 60-70 feet from the junction, he looked at the rear view mirror one more time, and as he saw no vehicle following him, he began to move his vehicle gradually to the right. He gave his hand signal when he was "three telephone posts" from the junction, and he only withdrew his hand when he was 20 feet away from the junction when he had to concentrate on turning his lorry into the junction. He admitted that he did not stop at the centre white line although he did slow down before turning right, and his explanation for this omission was that as he saw no vehicle coming from the opposite direction, and no vehicle following him from the rear, there was no reason for him to stop. Notwithstanding the severe cross-examination by the learned defence Counsel, he was very persistent in saying that he had looked at his rear view mirror twice and saw no vehicle following him from the rear. He also was very persistent in saying that there was no warning, such as a hooting sound, to indicate that the deceased's motorcycle was following him and trying to overtake him. In fact he could not say from where the said motorcycle came and collided on to his lorry. In re-examination, the first defendant said that he could not make a sudden turn at or near the junction as it was impossible for his 4-ton lorry to make a 90 degree turn on to the side road leading to JKR Barracks II which was only 11 feet wide.

The second witness, Mohd. Ariffin bin Jasin, was a passenger in the JKR lorry which was involved in the accident. He was sitting in the front seat beside the first defendant. He corroborated the evidence of the first defendant when he said that while proceeding to the JKR Barracks II to collect a chain saw, the first defendant gave a light signal and also a hand signal when he was about three telephone posts away from the junction leading to the JKR Barracks II. He also said that when the first defendant was proceeding slowly to turn right into the junction, he suddenly heard the sound of collision. He heard the sound when the lorry was about to enter the junction. He confirmed that he did not hear any hooting sound from any vehicle, and that the lorry driven by the first defendant was travelling slowly. Under cross-examination, the learned Counsel for the plaintiff asked him whether he was shown a copy of his statement made by him to the police. At first he denied that he had

refreshed his memory from the statement but he corrected himself, and said that one lady showed him a written statement to refresh his memory. However, he said quite clearly that he had not discussed the case with the first defendant at all.

Pausing here for a moment to make an observation regarding the testimony of PW2 notwithstanding the fact that the learned defence Counsel did not make an issue of the fact that PW2 had been shown a written statement, (which I suppose PW2 meant the statement made by him to the police under s. 112 of the CPC), nevertheless I cannot close my eyes to this rather unusual happening. I was inclined to reject the testimony of PW2 completely in view of the unusual occurrence. However, in the course of my research of the case law, I came across the case of *Lim Hong Yap v. PP* [1978] 1 MLJ 154. There a same incident occurred and the defence raised the incident as one of the grounds of appeal to the Singapore Court of Appeal. In holding that such an incident would not *per se* render nugatory the testimony of the delinquent witness, Wee Chong Jin, CJ said at p. 157:

> Testimony in the witness box becomes more a test of memory than of truthfulness, if witnesses are deprived of the opportunity of checking their recollection beforehand by reference to statements or notes made at a time closer to the events in question.

The judgment in this case is obviously not binding on me although the proposition enunciated by the Singapore appellate Court is highly persuasive and is often respected. Nevertheless with great respect, I do not propose to apply the principle laid down in the *Lim Hong Yap* case to sustain the testimony of PW2 in view of the fact that PW2 was with the first defendant when the police statement was shown to PW2 the day before he gave his testimony. In the result, I am not prepared to give much weight to his testimony. Hence, I do not propose to make any reference to what PW2 said in his evidence under cross-examination and re-examination.

However that may be, the testimony of the first defendant is to my mind quite straightforward, and rings a clear sound of truth. I say this because having seen his demeanour, the way he carried himself in answering questions posed to him, particularly when he was under cross-examination, and above all the consistency in his evidence, I have no doubt that he is a truthful witness. Furthermore on the day when he testified he was and I suppose still is, a pensioner and therefore in testifying at the trial of this case, he was not dictated by any fear of dismissal or any disciplinary action which his employer might institute against him. This fact goes to show that he is not an interested witness as he has nothing to gain or to lose by telling the truth. More importantly, his testimony is corroborated by his report which he lodged at Gurun Police Station, Police Report No. 1956/76 (see p. 1 of the further agreed bundle of documents Exhibit "B") about five minutes after the collision. Within that short interval of time, it is quite improbable that what he said in the report was an after-thought.

From the above discussions, I can safely make the following findings of fact:

(1) About 100-120 feet from the junction, the first defendant put his signal light and also a hand signal to indicate that he was going to turn right.

(2) At the same time he also looked at his rear view mirror to see whether there was any vehicles following him from her rear and he did not see any vehicle approaching him from the rear.

(3) His lorry was then travelling on the crown of the road and near to the centre white line.

(4) His lorry then travelled on for another 30 to 40 feet when he looked one more time at his rear view mirror, and he still saw no vehicle following him. At that time his signals were still on and he began to move his lorry gradually more to the right.

(5) After travelling another 10-20 feet, he then made a partial turn and the front of his lorry had already crossed over to the right half of the road when the motorcycle ridden by the deceased knocked on to it.

From the above summary of my findings, the only thing the first defendant had omitted to do was to look into his rear mirror a third time before he made the turn to his right when he was about 20 feet from the junction. But can one default him for that omission? The answer to this question can be extracted from the case *Kelly v. Easi-Life Products* (reported in *Bingham on All the Modern Cases on Negligence* 2nd Edn., p. 185 Case No. 102). There, the motorcyclist (plaintiff) attempted to overtake the defendant's lorry as it was turning right. A collision occurred, and in his evidence the driver of the lorry said that he looked into the mirror, put out his hand for 30 yards before he started to turn. He looked at the mirror one more time and brought in his hand 20 yards before the place of turn in order to change gear. In the circumstances, it was held by Singleton LJ that the defendants were not liable and, in so holding learned Judge said:

> I think he was entitled to assume, not merely in fact by putting out his hand but also from what he was obviously doing, moving to the centre of the road, that it must have been abundantly apparent to anyone who was coming up behind him that he was going to make the turn.

Likewise in the present case, the first defendant had given signals to turn right for nearly 30 yards and it was only when he had 20 feet to go before he brought in his hand and made the turn. If the deceased's motorcycle had followed the defendant's lorry all the way he would and should have seen the light signal, if not the hand signal. He should not have attempted, still less, to overtake the defendant's lorry.

As stated earlier it is most unfortunate that the plaintiff was not able to find an eyewitness to testify as to what the deceased did or did not do prior to and at the time of the collision. However that may be, some useful inferences can be drawn from the sketch plan at p. 1, and the key of the plan at p. 2 of the agreed bundle of documents Exhibit "A". It is to be noted that the broken curved lines from "L1" to "L2" depict scratch marks made by motorcycle commencing from "L1" and ending at "L2" and the distance between the two points is given as 12 feet 9 inches. From the scratch marks, it is logical to infer that the point of impact was at or near point "L1". In other words, it was at or near "L1" that the motorcycle knocked on to the front mudguard of the lorry, and veered off at a slanting position with the foot-rest of the motorcycle scrapping the road surface until it finally landed at point "L2". Bearing in mind that the lorry had made a turn to the right some 20 feet from the junction, and that the front part of the lorry had crossed over the centre white line to the right half of the road, this occurrence coupled with the scratch marks as shown in the sketch plan, lends credence to the fact that the deceased tried to overtake the lorry at or near point "L1". Since the first defendant had not only given signals indicating his intention to turn right, but also manoeuvred his lorry in such a position some 60 feet prior to making the turn, it should be abundantly clear to the deceased that the lorry was going to turn right, and he should not have attempted to overtake the lorry on the right side. Had he kept a proper lookout, it might have been clear to him that there was ample room on the left side of the lorry for him to overtake it.

However that may be, there is still an unanswered question and it is this: How could the first defendant have failed to realise that a motorcycle was following him from the rear? The only reasonable explanation is that the deceased must have followed the lorry too close and it was in such a position as to come within a 'blind spot' of the lorry from where the existence of the motorcycle would not be reflected on the rear view mirror. Hence, the first defendant was not able to notice the deceased notwithstanding the fact that he looked at the rear view mirror on two occasions. Furthermore, the deceased did not sound his horn. At any rate, at that point of time, it can hardly be disputed that the defendant would and should look towards the direction of the narrow junction of 11 feet wide into which he was trying to drive his 4-ton lorry. There is a limit as to how much a human eye could see. This is well illustrated in the case of *Ralph v. Bramly* (reported in *Bingham on All the Modern Cases on Negligence* 2nd Edn., case 105 where Lodson LJ said:

> The human vision although it is very remarkable and takes in a very wide field, cannot take in everything at the same time. The driver has to look not only in front but to right and to left and in his mirror behind but cannot look at all these places at the same time. His primary duty is to look at the part of the road in which he is himself travelling. That does not mean that he is absolved from keeping observation even at the pavement as well as on the other half of the road. But that is really a matter of degree.

For the above reasons, I have no choice, but to hold, with great reluctance, that the deceased driver was totally at fault. It was due to his negligence that the accident occurred. I confess that I cannot find anything to default the first defendant, as he had done all he could and had observed the essential rules of the road. In the circumstances I therefore dismiss the claim of the plaintiff with costs.

In the event that I am wrong in my finding, I would have assessed the quantum as follows:

1) Pretrial loss of dependency claim

At the time of his death, the deceased was 30 years of age. It was agreed by Counsel (see agreed statement of fact Exhibit C) that the defendant suffered loss at RM202 per month. The accident occurred on 5 October 1976 and the hearing of this case commenced on 28 April 1986, a lapse of 114 months. Hence the pretrial loss of support would come to RM23,028.

2) Post trial loss of dependency claim

It is to be noted that at the time of the accident, the deceased was 30 years of age and at the date of the trial he would have been 39 years 6 months of age. Based on these figures, I would use a multiplier of 10 and I do so, bearing in mind the normal contingencies of life and the fact that the deceased would retire on reaching his 55th birthday. Now, as to his future earnings, PW2 said that had he lived, he would be earning about RM880 per month. The reason for the increase in his salary was due to the various adjustments introduced by the various government service salary schemes. In the circumstances, it is also fair to say that his household expenses would proportionately enhance, in that he would have to pay more to upkeep his family as his children would have grown older. He had, therefore, to pay more for his children's clothings, education and also his wife's expenses. Taking these into consideration, I think a sum of RM500 for the loss of future support is a fair amount. With a multiplicand of RM500, and a multiplier of 10 the figure according to the actuary table would be RM46,330.42 which I would round up to RM46,350.

As regards to the loss of future earnings for the benefit of the estate, the amount I would have awarded under this head would be absorbed under the awards given pursuant to s. 7 of the Civil Law Act. I say this because with a monthly income of RM880, a deduction of

RM350 per month as his own personal expenses would have to be made, leaving a surplus of RM530 per month. Adopting a multiple of 14, the amount, according to the Annuity Table, would be RM62,955.36 which sum is of course less than the sum of RM69,328 awarded under the dependency claim.

There are two more matters that I would have to consider. Firstly the damage under the head of loss of expectation of life, and for that matter I would have awarded RM5,000. Secondly, in the statement of claim there is a claim for a sum of RM600 for funeral expenses, which I think is a fair amount, and I would have awarded that sum. Finally as regards to interest, the special damages would carry interest at 3% p.a. from the date of the accident to the date of the trial. For general damages, the interest would be 6% p.a. from the date of service of the writ to the date of the trial.

As I have given judgment for the defendants, they are also entitled to costs of the proceedings.

Also found at [1989] 1 CLJ 18